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In The

Supreme Court of the United States

October Term, 1983

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTEN HAYDIS, and JOHN CURRIE, constituting the members thereof,

Petitioners,

vs.

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, ROBERTA PURDY and PHILIP STANLEY,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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2. The U.S. Ninth Circuit Court of Appeals committed obvious error when they reversed the Arizona Federal District Court and remanded the case ". . . *for consideration of these issues* [due process] *which were not encompassed* within any state court litigation between these parties", because said due process issues were obviously "encompassed" in the Arizona State Court litigation. 10

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REPLY BRIEF OF PETITIONER

ARGUMENT #1

Respondents (plaintiffs below) are barred under *Migra v. Warren City School District Board of Education*, ____U.S.,____, 76 L.Ed. 2nd 56 (1984) from litigating in the Federal Court 42 U.S.C. Sec. 1983 claims where respondent had an opportunity to raise those claims in a previous State Court proceeding in Arizona so that the Arizona State-Court Judgment has the same preclusive effect in Federal Court that the Judgment would have in the Arizona State Courts.

Long before the *Migra* decision the U.S. 9th Circuit Court of Appeals effectively applied the preclusion rule set up in *Migra* through the court's decision in *Scoggin v. Schrunk*, 522 F.2d 436 (CA 9, 1975). Plaintiffs now argue in their brief in opposition to the Petition for Writ of Certiorari that *Migra* and therefore *Scoggin* do not apply for two reasons: **one**, because this 42 U.S.C. Sec. 1983 action was filed before the state court damage actions were filed, and **two**, that *Migra* does not apply and does not compel a different result because in *Migra* the action was tried "on the merits" in the state court of Ohio sitting without a jury with judgment rendered in favor of the plaintiff while in this case there never was consideration of the merits of respondent's state court claim and therefore respondents are not precluded from pursuing their section 1983 action (respondent's brief, page 8).

It makes no difference whether this federal suit was filed first or the state court action first because the general law is that if two actions are pending at the same

time and a judgment in one becomes final it may be raised in bar of the other regardless of which action was begun first. See Restatement of Judgments Second, Section 14. Under general comments it is stated:

> *Nor is a judgment,* otherwise entitled to res judicata effect in a pending action, *to be deprived of such effect by the fact that the action in which it was rendered was commenced later than the pending action.* It is merely required that rendition of the final judgment shall antedate its application as res judicata in the pending action. (Emphasis added)

This is also the law in the State of Arizona, see *Day v. Wiswall's Estate,* 341 P.2d 217, 98 Ariz. 400 (1963).

Additionally the fact that this case was decided at the state court level on a motion for summary judgment and not after a full blown trial before the court is not determinitive. See *Mitchell v. National Broadcasting Co.,* 553 F.2d 265 (CA 2nd, 1977) and see 1B Moore's Federal Practice, paragraph 0.409 [1], at 1005 (1974 and 1975 Supp.) (footnotes omitted), and cases cited therein. See *Hubicki v. ACF Industries, Inc.,* 484 F.2d 519, 524 (3d Cir. 1973) *(summary judgment is a final judgment on the merits sufficient to raise defense of res judicata in subsequent action between the parties);* citing numerous cases.

Also *involuntary dismissal* under the federal and Arizona Rules of Civil Procedure, Rule 41(b) "operates as an adjudication upon the merits."

Respondents/plaintiffs' argument that the state court judgment was not "on the merits" because it was either dismissed or rendered pursuant to a summary judgment is contrary to the law. The Sixth Circuit in *Olsen v. Muskegon Piston Ring,* 117 F.2d 163, (6 CA 1941) stated as follows:

> Appellants' contention that no judgment was rendered *on the merits* also is not tenable. *It is sufficient if the record shows that the parties might have had their controversies determined according to their respective rights if they had represented all their evidence and the court had applied the law.* Freeman on Judgments, 5th Ed., Vol. II. Sec. 723-725.

A summary judgment in Arizona,

> ". . . is conclusive as to every point decided therein, *and also as to every point raised by the record* [either explicitly or implicitly] *which could have been decided,* with respect to the parties or their privies . . ." (Emphasis added) See Day v. Wiswall cited supra and also see *El Paso Natural Gas Company v. State,* 599 F.2d 175, 123 Ariz. 219 (1979).

Arizona's recognition of the requirements of exhaustion of administrative remedies has been long settled. *Campbell v. Chatwin,* 102 Ariz. 251, 428 P.2d 108 (1967). Arizona courts also recognize that there are exceptions to that rule where the remedies are *futile* or *useless,* see *Town of Paradise Valley v. Gulf Leisure Corp.,* 27 Ariz. App. 600, 357 P.2d 532 (1976).

Respondents/plaintiffs in their state court action alleged at the trial level and on appeal that the procedures and administrative remedies offered were *inadequate, meaningless* and *futile.* The respondents/plaintiffs cited *Amato v. Bernard,* 618 F.2d 559 (1980, CA 9) as authority for their argument. The Ninth Circuit in that case was reviewing a lower court's order for summary judgment for defendants because plaintiffs failed to exhaust administrative remedies. The court cited the exception to the rule, i.e. futility and inadequacy but upheld the summary judgment stating:

> *The record is similarly devoid of evidence that it would be futile* for Amato *to pursue his claim administratively.* Indeed, the only argument Amato makes to show such futility is the one we have just considered and rejected, that his administrative remedies are inadequate. (Emphasis added)

When respondents/plaintiffs alleged inadequacy and futility of such remedies they directly put into question the adequacy of the remedies which was the very substance of respondents/plaintiff's claim. Respondents/plaintiffs recognized that the Arizona state courts made such a finding when they stated at page 9 of their petition for review in state court as follows:

> *The Court's finding that no exception to the exhaustion requirements applies* to the instant case fails to consider the evidence in the light most favorable to Plaintiffs, as is required in reviewing a motion for summary judgment. *In reaching its decision the Court resolved a number of factual issues adverse to Plaintiffs' position.* Each of the following issues is germane . . . (Emphasis added)

The merits of the respondents/plaintiff's claim below in the state court damage action were that respondents/plaintiffs were due certain due process procedures and procedures under the AWC handbook, and that they were denied these remedies and/or the remedies were *futile* or *inadequate* or *meaningless.* It makes no difference whether these remedies were classified as federal due process remedies or contractual handbook remedies. *Both the trial court and the Court of Appeals of Arizona found the remedies were adequate and were not meaningless or futile to pursue; these findings answered the very substance and merits of respondents/plaintiffs' state court claims.* The exhaustion of administrative remedies

question could not be reached if plaintiffs had proven that AWC had denied the plaintiffs adequate and meaningful remedies under the handbook. It is defendants' position that since plaintiffs could have brought their due process 42 U.S.C. Sec. 1983 issues in the state court at that time and they did not, under *Migra* they are now precluded from bringing such a second action because the Arizona preclusion law so dictates.

ARGUMENT #2

The U.S. Ninth Circuit Court of Appeals committed obvious error when they reversed the Arizona Federal District Court and remanded the case ". . . *for consideration of these issues* [due process] *which were not encompassed* within any state court litigation between these parties", because said due process issues were *obviously* "encompassed" in the Arizona State Court litigation.

In in the state court action subsequent to the award of summary judgment to the defendants, plaintiffs / respondents continued to argue lack of *due process,* violation of handbook procedures and that the procedures offered were **inadequate, futile** and **meaningless.**

In plaintiff/respondent's motion for new trial in the state court dated May 13, 1982 they stated as follows: (at page 7)

> Judge Nabours' ruling in action no. 38653 was reversed by the Court of Appeals of Arizona on March 4, 1980. *Cooper v. Arizona Western College District Governing Board,* 125 Ariz. 463, 610 P.2d 465 (1980). The reversal of Judge Nabours' initial ruling required the resolution of the due process issues raised in the Federal Court action. *These due process issues appear to*

have become incorporated into the present damage actions through defendants' Motion for Summary Judgment.

Plaintiffs directly put due process and the adequacy of the offered remedies at issue in the state damage action. This can be seen by looking at the order for judgment in the state trial court and opinion from the Court of Appeals (see said order set out verbatim in the appendix C-1 to the petition for writ of certiorari, and the order and Memorandum Decision of the Court of Appeals for the State of Arizona set out in the appendix B-1 to the petition for writ of certiorari).

The fact that the state trial court judge found that plaintiffs failed to exhaust their administrative remedies is consistent with his further finding, and that of the Court of Appeals of the State of Arizona, that the due process procedures and hearing offered as remedies were adequate and were not meaningless.

You cannot reach an exhaustion of administrative remedies finding without reviewing what remedies were offered. In other words the judges had to look to see what remedies were offered to the plaintiffs to see if they were adequate and meaningful so as to comport with due process and/or the handbook. It is obvious that the trial court and the Court of Appeals in Arizona specifically found the remedies offered by the defendants comported with due process and those findings necessarily would have to be included in any findings or decision that the plaintiffs failed to exhaust the administrative due process and/or handbook remedies offered. An appellate court may affirm on any ground squarely presented on the record (see *Jacobson v. Tahoe Regional Planning Agency,* 558 F.2d 928 (CA 9, 1977)) and that is what the Arizona Court of Appeals did when it also found that what AWC offered as remedies were

not inadequate, meaningless, and futile and that they further comported with due process.

Federal cases have drawn a clear distinction between cases where the issue is exhaustion of administrative remedies and those cases where the issue is alleged unconstitutional conduct that is something other than the failure to provide a due process hearing. See *Bass v. Spitz,* 510 F.Supp. 182, (1981) footnote 89 at page 184 and *Suckle v. Madison General Hospital,* 499 F.2d at 1367 (1974).

In this case the respondents/plaintiffs put due process at issue at the state court level. Their responsive briefs at the trial court level, their briefs in the Arizona Court of Appeals, their Motion for Reconsideration before the Court of Appeals of the State of Arizona and their Petition for Review before the Supreme Court of the State of Arizona all contain arguments that the due process procedures offered were **futile** and **meaningless** and therefore there was an exception to the doctrine of exhaustion in the State of Arizona. If the plaintiffs had proved that the offered due process was futile or meaningless their position would have been upheld and summary judgment would not have been granted or upheld. The respondents/plaintiffs' claims that they were denied due process presented a federal constitutional question which state courts are competent to decide (see *Brown v. DeLayo,* 498 F.2d 1173 (1974, 10th Cir.)). Respondents/Plaintiffs' appellate procedure, after the finality of the Arizona state judgment, was to seek certiorari review in the United States Supreme court pursuant to 28 U.S.C. Sec. 1257(3).

Even if the due process issues were not tried, the plaintiffs had the opportunity to bring their 42 U.S.C. Sec. 1983 action in state court before the final state court judgment was rendered and because they did not

pursue it they are now precluded under the *Migra* decision from so proceeding in federal court

ARGUMENT #3

This petition for Writ of Certiorari is not premature under the circumstances.

This Petition for Writ of Certiorari is not premature under the facts of this case. *Migra* was recently affirmed and applied summarily by the U.S. Supreme Court in the case of *Virgil E. Tompkins etc., et al. v. Loraine Garguil,* No. 83-208. In that case the petition for writ of certiorari was granted and the judgment vacated and the case remanded to the United States Court of Appeals for the Second Circuit for futher consideration in light of *Migra.* No oral argument was held or additional briefs filed. This is what petitioner is requesting in this case. Merely because the petition for writ of certiorari is filed prior to a final judgment is not alone an absolute basis for denial of such petition.

Defendants/petitioners have filed a new motion for summary judgment in the Federal District Court based on the *Migra* decision and on the further grounds that a review of the due process issues will support findings of fact and conclusions of law in favor of the defendants/petitioners. Respondents/plaintiffs in their responsive brief to this motion reduced themselves to a personal attack on the below signed attorney attempting to obtain sanctions for filing the motion for summary judgment and alleging not only that *Migra* does not apply but that the Federal District Court should set this case for trial on the merits.

This case before the court was filed on approximately March 1 of 1977. It has involved multiple litigation. It has often been said that justice delayed may be no justice at all. This is especially true in protracted litiga-

tion such as here where the potential is a possible long trial in the federal district court, possibly before a jury, with great expense in time and money not only to the parties but to the court system. Further, there is the potential that with an adverse verdict to the defendants there will be another appeal to the U.S. Ninth Circuit with an ultimate new petition for writ of certiorari in the United States Supreme Court, again based on the *Migra* case. A petition for writ of certiorari at that time would again be only after much time, work, money and aggravation that could be avoided by a clear summary disposition by this court that the *Migra* preclusion rule does apply and that therefore Arizona preclusion laws must be reviewed by the federal district court to determine whether the plaintiffs are precluded from pursuing their claim in federal court.

Also, in regards to the Ninth Circuit's obvious error in finding that the due process issues were not encompassed within the state court litigation, *how can an apellate court not step in and rectify such an obvious error?* Even if the case is in an interim status, the rectification of that error will summarily dispose of the case. All one has to do to see the obvious error is to read the Arizona Court of Appeals' opinion (Appendix B to the Petition for Writ of Certiorari). It should make no sense to anyone including the judicial or legal professions or lay observers, who are so quick to criticize the system, to prolong litigation based on inflexible precepts that invariably melt away in the face of the "proper case".

CONCLUSION

The obvious error of the Ninth Circuit in finding that the due process issues were not encompassed within the state court litigation is so severe as to require immediate attention. **This blatant error is of the type that**

causes people to criticize and question the integrity of our judicial system. The Arizona Court of Appeals *specifically affirmed* the trial court's summary judgment finding that the remedies defendants AWC offered plaintiffs comported with *due process.* Therefore, the Ninth Circuit did not give the state judgment full faith and credit as they are required by 28 U.S.C. Sec. 1738. The case should be reversed based on that error.

Besides the obvious error of the Ninth Circuit, the *Migra* case and the subsequent Supreme Court case of *Tompkins v. Garguil,* cited supra, require this case to be *summarily remanded* to the Ninth Circuit for its remand to the Arizona Federal District Court with instructions to that court ". . . to conduct such further proceedings as are required by, and are consistent with this opinion *[Migra]*".

Respectfully submitted,

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